(3)

No. 05-1450

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

V. STEPHEN MOORE,

Petitioner,

v.

ACCENTURE LLP, ACCENTURE UNITED STATES GROUP LIFE INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DEPENDENT ACCIDENTAL DEATH AND DISMEMBERMENT PLAN, and ACCENTURE UNITED STATES GROUP DEPENDENT LIFE INSURANCE PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Accenture, LLP, whose correct name is Accenture LLP, is an Illinois Limited Liability Partnership, not a corporation.

Respondents Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, whose correct name is Accenture United States Group Life Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, whose correct name is Accenture United States Group Dependant Accidental Death and Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan, whose correct name is, Accenture United States Group Dependant Life Insurance Plan, are employer sponsored employee welfare benefit plans. None of these respondents are corporations.

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COUNTER-STATEMENT OF THE CASE[1]

In late 2002, Accenture announced to its employees that it was changing its leave of absence policy and the related provisions of its various benefit plans to clarify, and in some cases limit, the length of time employees would be allowed to remain employed in a leave of absence status. R. 1-1-5, 6. Under the new policy, employees who had fewer than ten years of service when they began a leave of absence would be limited to three years of leave, after which, they would be required to return to work or to terminate their employment. R. 1-4-Ex. 2. For those employees who were already on leave at the time of the announcement, Accenture agreed to delay the effective date of the new policy so that none of them would be terminated before January 1, 2005, regardless of the length of time they had already been on leave. R. 1-4-Ex. 2. Thus, these employees were effectively grandfathered under the old system for an additional two years.

Petitioner V. Stephen Moore began working for Accenture in 1987 and commenced a disability leave of absence in 1992, after approximately five years of active service. R. 1-1-8, 9. He was still employed in a disability leave of absence status in 2002, when the new policy was announced. R. 1-1-9. Under the new policy, Moore would have been ineligible to remain on leave beyond December 31, 2004. R. 1-1-9. Thus, his employment would have terminated effective January 1, 2005, unless he had returned to work by that date. R. 1-1-9.

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1. Respondents submit this Counter-Statement of the Case because Petitioner's Statement of the Case omits and/or mischaracterizes important record evidence which underlies the Eleventh Circuit's holding and also misstates the history of the proceedings below in several important respects.

On October 25, 2004, Moore filed his putative class action Complaint in this case, challenging the new policy, which would have terminated his employment and ended his right to participate in various of Accenture's employee benefit plans. The Complaint asserted claims pursuant to the Employee Retirement Income Security Act, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"); specifically, 29 U.S.C. § 1140 and 29 U.S.C. § 1132(a)(1)(B). R1-1-10. The action named as defendants, Accenture and each of the benefit plans in which Moore's participation would have ceased as a result of the new policy. R. 1-2-4. Moore provided a courtesy copy of the Complaint to Accenture's attorneys, but never formally served the Complaint and never requested a waiver of service pursuant to Fed. R. Civ. P. 4(d). R. 1-7-2.

At about the same time Moore filed his original ERISA lawsuit, he also filed two charges of discrimination with the Equal Employment Opportunity Commission, alleging that the same decision constituted discrimination on the bases of disability and age, respectively. R. 1-4-4. Both charges were referred to the EEOC's alternative dispute resolution system for mediation. R. 1-4-4. However, no mediation was ever conducted as to either charge, and the EEOC ultimately issued no-cause determinations on both charges.

On December 8, 2004, shortly after the parties initially agreed to mediate the discrimination charges, Moore voluntarily dismissed the ERISA lawsuit, in what he characterized in his briefs on appeal as a "show of good faith."[2] R. 1-4-4. The dismissal was accomplished by the

2. By his own admission, Moore dismissed his lawsuit because of the planned mediation of his individual dispute before the EEOC. Although Moore's Special Motion is artfully pled to imply the (Cont'd)

filing of a Notice of Voluntary Dismissal, dated December 7, 2004, and stating: "COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a) to *voluntarily dismiss* without prejudice the above-styled action." Pet. App. 3-4 (emphasis added). The dismissal was entered by the Clerk of Court, "pursuant to Rule 41(a)(1)(i)~~(ii)~~, F.R.C.P." Pet. App. 5-6 (strike-out in original).

On December 9, 2004, Accenture began notifying the temporarily grandfathered employees that it had decided not to apply the new policy to them after all. R. 1-7-2. Thus, Accenture's counsel wrote to Moore's counsel to advise that Moore and the other temporarily grandfathered employees were being exempted from the new policy and would not be terminated on January 1, 2005. R. 1-4-4-5; R. 1-4-Ex. 4.

On January 4, 2005, nearly a month after the dismissal and termination of the case, Moore filed the "Special Motion" that is the subject of this appeal, seeking an award of fees and costs against the Defendants and an opportunity to conduct limited discovery. As Moore described his proposed discovery, its purpose would have been to ascertain the value of the benefit realized by the putative class as a result of Accenture's decision not to apply the new rule to them. R. 1-4-10. Moore argued that his attorney was entitled to enforce the contingency fee agreement between himself and Moore against the entire putative class, and that Defendants should

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(Cont'd)

existence of a deal under which Accenture agreed to mediate in exchange for his agreement to dismiss the federal lawsuit, no such "deal" is actually alleged and none existed. In fact, Moore made the decision to dismiss without first consulting or even advising Defendants or their counsel.

be responsible for paying him an amount equal to that sum.[3] R. 1-4-9-10.

On September 20, 2005, the District Court denied Moore's Special Motion for Attorneys' Fees in this action. In its Order, the District Court held that "[t]he Plaintiff voluntarily dismissed this action before he obtained any substantive relief for himself or the class that he claimed to represent, [thus] [a]n award of attorney fees is not appropriate."[4] R. 1-10-1. In the same order, the

3. Before filing the "Special Motion" in this case, Moore filed a second putative class action Complaint ("Moore II") based on the same causes of action raised in the original Complaint, but expressly acknowledging that "the underlying issues in this matter have all been resolved by Defendant . . . ," and that he and all the putative class members he purported to represent have already received the relief sought in the Complaint. In fact, in the second Complaint, Moore expressly acknowledged that he had filed his second lawsuit solely for the purpose of seeking an award of fees as a "prevailing party" in the first, voluntarily dismissed lawsuit. Along with his second Complaint, Moore also filed and served a Motion for Fees and Costs. On May 6, 2005, the District Court granted the Defendants' motion to dismiss Moore II and denied Moore's motion for attorneys' fees. Moore did not appeal either of those decisions and his time in which to appeal those decisions has long since passed.

4. At several points in his Petition, Moore suggests that the district court once granted attorneys' fees to him or to the putative class. For example on page ii of the section entitled Questions Presented, Moore states: "The purpose of the Moore II complaint was to seek the attorneys' fees previously granted to the class, as admitted by Accenture/Andersen." Pet. at ii. Likewise, in his second numbered question, Moore asks, "Whether the class plaintiffs are entitled to the prior attorneys' fee award, notwithstanding the district court's subsequent dismissal." Pet. at iv. In fact, however, the District Court never awarded Moore or his putative class any attorneys' fees.

District Court also denied Moore's request for discovery. R. 1-10-1.

Moore timely appealed the District Court's September 20, 2005 Order to the Eleventh Circuit. On appeal, Moore conceded that the original controversy between the parties had been resolved by Accenture's decision to grandfather Moore and the putative class members and that attorneys' fees and costs were the only remaining issues in the case. In addition to reprising his arguments below, however, Moore argued for the first time on appeal that the District Court erred by allowing the dismissal of the case without first issuing notice to the putative class members.

In its decision, the Court of Appeals did not address Moore's argument that the District Court's dismissal was invalid because of the failure to give notice to the putative class. Pet. App. 1-2. Instead, the Court of Appeals simply noted that Moore admitted dismissing the case "in order to gain time to more properly represent the class through negotiated settlement rather than litigation." Pet. App. 2. The court then noted that it was not until the day after he filed his notice of voluntary dismissal that the plaintiff even learned that the relief he had been seeking in the lawsuit had been granted voluntarily by the defendants. Pet. App. 2. The Court of Appeals acknowledged the District Court's holding that Moore was not entitled to an award of attorneys' fees and costs because he had voluntarily dismissed the case "before he obtained any relief for himself or the putative class." Pet. App. 2. The Court of Appeals then stated that, finding no error in this holding, it was affirming the decision of the District Court. Pet. App. 2.

REASONS FOR DENYING THE PETITION

Moore has offered no "compelling reasons" why his Petition for a Writ of *Certiorari* should be granted. *See* Sup. Ct. R. 10. Despite his claims, Moore cannot demonstrate that the Eleventh Circuit's February 10, 2006 decision in this case conflicts with the decisions of this Court or of any other Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Indeed, the Petition arises out of an unremarkable case in which the United States Court of Appeals for the Eleventh Circuit affirmed a District Court's decision to deny Moore's "special motion" for attorneys' fees and costs because he had already voluntarily dismissed the case before obtaining any relief for himself or his putative class.

Moore argues that the Eleventh Circuit's decision is in conflict with a decision of the Sixth Circuit, purportedly holding that the language of Rule 23(e) of the Federal Rules of Civil Procedure requires district courts to give notice to putative class members before permitting the dismissal of any case nominally brought as a class action, regardless of whether a class has been certified. However, Moore's characterization of the Sixth Circuit's holding is simply wrong. Moreover, the Eleventh Circuit did not even address the issue of notice to the putative class in its decision. Although Moore apparently believes that the Eleventh Circuit necessarily implicitly rejected the purported holding of the Sixth Circuit because it ignored his argument that the voluntary dismissal should not have been entered without notice to the putative class, he fails to note that he never raised this argument in the District Court. Thus, it is equally likely that the Eleventh Circuit simply concluded that Moore

had waived the argument. Finally, even if the Eleventh Circuit's decision arguably conflicts with that of the Sixth Circuit, Moore's case is an inappropriate vehicle for resolving that conflict because of Moore's failure to preserve the notice issue by raising it in the District Court.

Second, Moore suggests that there is a conflict between the approaches employed by the Eleventh and the Eighth Circuits to determine whether attorneys' fees should be awarded to prevailing parties in actions brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Specifically, Moore argues that the Eighth Circuit mandates the award of attorneys' fees to prevailing parties, whereas the Eleventh Circuit applies a five-factor test to determine whether fees should be awarded. In fact, however, the Eighth Circuit decision to which Moore cites was expressly overruled almost four years ago, in favor of an approach that the *en banc* court noted was in line with the "overwhelming majority of circuits [including the Eleventh Circuit] that have considered the question." *Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 1159 (2003).

Moore's remaining arguments all focus on alleged errors of law and fact by the Courts below, none of which would warrant the granting of a writ of *certiorari* in this case. For example, Moore suggests that the Courts below should have concluded that Respondents' decision to grant relief to the class preceded Moore's filing of the Notice of Voluntary Dismissal, even if Moore was unaware of the decision when he filed the Notice. Likewise, Moore argues that the Courts below should have construed his Notice of Dismissal as a dismissal only as to Moore himself and not as to the class, or that it should have construed the notice as a motion

requesting the District Court's intervention. Finally, Moore suggests that it was error for the Courts below to allow the dismissal without first determining whether relief had in fact been afforded to the entire class as both sides seemed to agree in their pleadings. None of these disputes rises to a level warranting this Court's grant of a writ of *certiorari*.

I. There is no Conflict Between the Decision of the Eleventh Circuit and the Sixth Circuit Decision to Which Moore Cites Warranting *Certiorari* in this Case

In his Petition Moore suggests that the Eleventh Circuit's decision in his case is in conflict with the Sixth Circuit's decision in *Doe v. Lexington-Fayette Urban County Government*, 407 F.3d 755 (6th Cir. 2005). In particular, Moore argues that the two decisions reach different conclusions about whether the language of Rule 23(e) of the Federal Rules of Civil Procedure, as amended in December 2003, requires district courts to give notice to a putative class before granting a request for voluntary dismissal. Moore claims that the *Doe* court held that notice is required even under the newly amended language of the rule, whereas, the Eleventh Circuit and at least two district courts have taken the opposite view.

Prior to the December 1, 2003 amendment, Rule 23(e) provided that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." In contrast, the amended rule provides that: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e).

By its plain language, the amended Rule 23(e) requires judicial approval of a dismissal only after a class has been certified. In fact, Rule 23(e) was amended in 2003 to make clear that court approval is required for voluntary dismissal and settlement only as to *certified* classes. *Aikens v. Deluxe Fin. Servs., Inc.*, Civ. Action No. 01-2427-CM, 2005 U.S. Dist. LEXIS 8079, at * 13-15 (D. Kan. March 2, 2005) ("The plain language of Rule 23 indicates that the court has no duty or jurisdiction to approve [a voluntary dismissal] in a case where a class is not certified."); *Daniels v. Bursey*, Case No. 03 C 1550, 2004 U.S. Dist. LEXIS 20950, at * 18-19 (N.D. Ill. Oct. 19, 2004) (discounting plaintiff's argument that Rule 23(e) required court intervention in a settlement of a class action in which the class was not certified based on the plain language of the rule resulting from the 2003 amendment). The advisory committee notes accompanying the proposed amendment further reinforce this interpretation:

> Rule 23(e)(1)(A) resolves the ambiguity in the former Rule 23(e)'s reference to dismissal or compromise of a "class action." That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. . . . The new rule requires approval only if the claims, issues, or defenses of a *certified* class are resolved by settlement, voluntary dismissal, or compromise.

Fed. R. Civ. P. 23 advisory committee's note (emphasis added).

Moore argues that the *Doe* case, which he notes was decided after the effective date of the amendment, holds that notice to the uncertified putative class is still required before

a dismissal, even under the amended Rule 23(e), and that *Doe* is therefore in conflict with the Eleventh Circuit's decision in his case. However, Moore is wrong for at least three reasons.

First, although *Doe* was decided after the effective date of the amendments to Rule 23(e), the dismissals at issue in *Doe* occurred before the effective date of the amendment. Moreover, the Sixth Circuit's decision in *Doe* makes clear that it evaluated the propriety of the dismissals under the pre-amendment language of the Rule:

> Rule 23(e) of the Federal Rules of Civil Procedure regulates the dismissal or settlement of class actions. That subsection, ***as it applies to the facts of this case in its formulation prior to amendment in December of 2003***, provided that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e) 2003.

407 F.3d at 761 (emphasis added). Thus, *Doe* is not even in conflict with the decisions in *Aikens* and *Daniels*.

Second, even if the *Doe* holding were interpreting the post-amendment version of Rule 23(e), and therefore was in conflict with *Aikens* and *Daniels*, the decision would not be in conflict with the Eleventh Circuit's decision in Moore's case because the Eleventh Circuit's decision says nothing about the need for notice to the putative class. The decision is silent on that point, a fact even Moore concedes. *See* Pet. at 6 ("The Eleventh Circuit panel reached its decision on

February 10, 2006 affirming the erroneous decision by the district court without reaching a decision on the validity of the dismissal . . .”). Moore apparently argues that the Eleventh Circuit's silence is an implicit endorsement of the *Aikens* and *Daniels* holdings.

However, Respondent's noted in their brief on appeal that Moore had never raised the notice issue in the District Court. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1328-30 (11th Cir. 2004) (dismissing appeal on the basis that “‘an issue not raised in the district court and raised for the first time in an appeal will not be considered by this Court.’”) (quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994)); *Hall v. Coram Healthcare Corp.*, 157 F.3d 1286, 1290 (11th Cir. 1998); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991). Thus, it is entirely plausible that the Eleventh Circuit rejected Moore's argument, not because it reached a conclusion that Rule 23(e) does not require notice, but rather, because it concluded that Moore had waived the argument. Of course, regardless of why the Eleventh Circuit remained mute on the question, Moore's case is still an inappropriate vehicle for resolving the purported conflict precisely because he did not preserve the notice argument by raising it in the District Court. Moore's failure to preserve the notice issue represents a third reason why the purported conflict between *Doe* and the decision of the Eleventh Circuit would not justify granting his Petition.

II. The Eleventh Circuit's Decision is not in Conflict with Decisions of the Eighth Circuit Regarding the Entitlement of Prevailing Plaintiffs to Attorneys' fees in ERISA Actions

Moore also argues that the Eleventh Circuit's decision conflicts with a decision of the Eighth Circuit in regard to the entitlement of prevailing plaintiffs to attorneys' fee awards in ERISA actions. Specifically, Moore argues that the Eighth Circuit's holding in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980), *overruled by Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002) (*en banc*); *cert. denied*, 537 U.S. 1159 (2003), "mandates that the prevailing party in an ERISA case is entitled to attorneys' fees," and that decisions from the Eleventh Circuit instead require the courts to "conduct an analysis to determine if attorneys' fees in an ERISA case are appropriate." Pet. at 12. Moore's claim of a split in the circuits is simply wrong.

In fact, the Eighth Circuit, sitting *en banc*, expressly overruled the holding he cites from *Landro* almost four years ago. *Martin*, 299 F.3d at 271-72. After analyzing the arguments for and against the *Landro* court's presumption in favor of fee awards to prevailing ERISA plaintiffs, the *Martin* court stated:

> . . . we agree with the overwhelming majority of circuits that have considered the issue and concluded that the presumption should not be employed in ERISA cases. Although our circuit was the first to apply the presumption in ERISA fee-shifting cases, we now find that the use of

> several nonexclusive factors best facilitates the exercise of the court's discretion in ERISA cases. We overrule *Landro's* holding to the contrary.

299 F.3d at 971-72. Thus, even if the Eleventh Circuit's decision—which seems to rest on a finding that Moore was not a prevailing party at all and is silent on the standard to be applied in awarding fees—could be characterized as inconsistent with the holding in *Landro*, there is no *current* conflict between the circuits on this point.

III. Moore's Remaining Arguments Also Do Not Warrant the Granting of the Writ He Seeks

Moore's remaining arguments amount to little more than random assignments of error. However, the Courts own rules make clear that a writ of *certiorari* should only be granted based on "compelling reasons" and should rarely be granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moore's quibbles with the findings of the Courts below are largely comprised of alleged erroneous factual findings. For example, he claims that the Courts below should have concluded that the relief was afforded to him and his putative class before the dismissal, or alternatively that the lower Courts should not have found on the evidence before them that the entire putative class was actually afforded relief. Finally, he argues that the Courts below misconstrued his self-titled "Notice of Voluntary Dismissal," filed "pursuant to Federal Rule of Civil Procedure 41(a)," as just that, rather than as a motion to dismiss, to be acted upon only after due consideration by the District Judge. Even putting to one side the question whether this issue is frivolous, it is clear that the issue is not one warranting the exercise of this Court's discretionary jurisdiction on writ of *certiorari*.

CONCLUSION

For the reasons stated, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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